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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RICHARD ALBERT NOVISON, JR., Defendant and Appellant.	E038304 (Super. Ct. No. FVA20892) OPINION

APPEAL from the Superior Court of San Bernardino County. Douglas M. Elwell, Judge and Michael A. Knish, Temporary Judge.[1] Affirmed.

Lorn E. Aiken for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, and Scott C. Taylor, Supervising Deputy Attorney General, for Plaintiff and Respondent.

[1] Pursuant to article VI, section 21 of the California Constitution.

Defendant and appellant Richard Albert Novison, Jr., was charged with possession of marijuana for sale (Health & Saf. Code, § 11359). He moved to dismiss the case, pursuant to Penal Code section 995[2] and to suppress the prosecution's evidence against him pursuant to section 1538.5. The trial court denied both motions. Defendant then pled guilty and the trial court sentenced him to two years in state prison. The court ordered the sentence stayed pending this appeal.

Defendant now contends that the trial court erred in denying his motions to suppress evidence and dismiss the case since the evidence was obtained unlawfully. In the alternative, he argues that the court should have dismissed the case because there was insufficient evidence that he possessed the marijuana for sale. We disagree and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The following statement of facts is derived from the hearing on the motion to suppress: On November 13, 2003, Officers Bryan Wellott and Steve Hughes received a tip regarding a possible sale of narcotics at defendant's residence. They went to defendant's residence dressed in civilian clothes with raid vests and gun belts. Defendant's daughter answered Officer Wellott's knock on the front door. Officer Wellott asked her if defendant was home. He then asked for and received consent from defendant's daughter to enter the house to speak to defendant. Officer Wellott immediately saw defendant and told him that he had received information regarding some narcotics activity. Officer Wellott asked defendant if he could search his bedroom and

[2] All further statutory references will be to the Penal Code, unless otherwise noted.

defendant said, "Go ahead, by all means." After searching the bedroom, Officer Wellott asked defendant, "Can I go out and look in the garage or are the dogs going to eat me?" Defendant replied, "He won't eat you." Officer Wellott then searched the garage and found a glass pipe, a scale, and several Ziploc bags containing marijuana. Officer Wellott also found another 10 pounds of marijuana. He then arrested defendant.

Officer Wellott was carrying a microcassette recorder on his person and recorded his interactions at defendant's house. The audio recording was played for the court at the suppression hearing and was admitted into evidence. Defendant and defendant's daughter both withdrew their declarations at the suppression hearing and did not testify. After hearing Officer Wellott's testimony, as well as the tape recording, the court concluded that defendant impliedly consented to the search of the garage. The court denied the motion to suppress. The court previously denied defendant's motion to dismiss.

ANALYSIS

I. The Trial Court Properly Denied the Motion to Suppress

Defendant argues that the trial court erred in finding that the search was lawful because his daughter's consent to let the officers enter the house was not voluntary, but rather a submission to authority. Defendant further argues that he never consented to the officers' search of the garage. Accordingly, he claims that all evidence seized as a result of the search should have been suppressed. We disagree.

A. Standard of Review

In reviewing the denial of a motion to suppress evidence, "[w]e defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment. [Citations.]" (*People v. Glaser* (1995) 11 Cal.4th 354, 362.)

Furthermore, "[t]he question of the voluntariness of the consent is to be determined in the first instance by the trier of fact; and in that stage of the process, 'The power to judge credibility of witnesses, resolve conflicts in testimony, weigh evidence and draw factual inferences, is vested in the trial court. On appeal all presumptions favor proper exercise of that power, and the trial court's findings - whether express or implied - must be upheld if supported by substantial evidence.' [Citations.]" (*People v. James* (1977) 19 Cal.3d 99, 107.)

B. Defendant's Daughter Voluntarily Consented

Substantial evidence supports the trial court's determination that defendant's daughter voluntarily consented to the officers' entry into the house. The prosecution played the tape of the contact at defendant's house and heard the daughter's response to the officers. Defendant's daughter responded affirmatively and quickly when Officer Wellott asked if he could come in to speak with defendant. There was nothing in the record that disclosed that the officers manifested a coercive display of authority. Defendant's daughter's consent was express and voluntary.

C. Defendant Consented to the Search of the Garage

Substantial evidence also supports the trial court's determination that defendant impliedly consented to the search of the garage. When Officer Wellott asked defendant, "Can I go out and look in the garage or are the dogs going to eat me?" defendant replied, "He won't eat you." The court found that by replying in the negative to the latter part of the question, defendant impliedly answered in the affirmative to the first part of the question. The court further found that there was no evidence of coercion. We agree. There is nothing in the record to indicate that defendant's consent was anything but voluntary. His expression of assent to Officer Wellott and his failure to object when Officer Wellott walked out toward the garage suggest that he voluntarily consented. (See *People v. Smith* (1962) 210 Cal.App.2d 252, 256 ["[F]ailure to object is evidence of consent."].)

Defendant claims that when Officer Wellott asked him, "Can I go out and look in the garage or are the dogs going to eat me?" he replied, "*No*, he won't eat you." (Emphasis added.) Defendant argues that he did not consent to the officer's search because the "no" was in response to the first part of the compound question. However, the record clearly shows that defendant did not say "no," but simply, "He won't eat you."

Defendant further asserts that the trial court should have applied the following standard in determining whether the consent was voluntary: "[A] court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter." (*Florida v. Bostick* (1991)

501 U.S. 429, 439.) However, this rule, as stated in *Florida v. Bostick* concerned whether a person's encounter with a police officer constituted a seizure within the meaning of the Fourth Amendment. (*Id*. at pp. 433, 439.) It is therefore inapposite.

We conclude that there was substantial evidence to support the trial court's finding that defendant's daughter voluntarily consented to the officers' entry into the house and that defendant consented to the search of his garage. Therefore, the trial court properly denied the suppression motion.

II. The Trial Court Properly Denied the Motion to Dismiss

Defendant argues that the trial court erred in denying his motion to dismiss pursuant to section 995. We disagree.

"An information will not be set aside if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it. [Citation.]" (*People v. Hall* (1971) 3 Cal.3d 992, 996.) Here, defendant's section 995 motion was based on his claim that quantity of drugs alone is insufficient to show that the drugs were possessed for sale. However, a defendant can be held to answer based solely on the quantity of the drugs found. (*People v. Jackson* (1966) 241 Cal.App.2d 189, 194.) In addition, in this case, the officers found other indicia that the marijuana was possessed for sale, including a scale and marijuana packaged in several Ziploc bags.

Furthermore, inasmuch as defendant asserts the same arguments in support of his motion to dismiss and his suppression motion, we conclude that the trial court properly denied the motion to dismiss. (See § I, *ante*.)

DISPOSITION

The judgment is affirmed.

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/s/ Hollenhorst
J.

We concur:

/s/ Ramirez
P.J.

/s/ McKinster
J.